Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S5–24–2046 OF 2001
ABDUL MALIK ISHAK J
3 FEBRUARY 2006

Civil Procedure — Declaration — Application for — Application for declaration by way of counterclaim that defendant need not pay plaintiff compensation awarded — Project had been cancelled and defendant had issued notice of cancellation of said project to plaintiff

The first judgment was dated 4 December 2002 and it has since been reported vide *Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd* [2003] 1 AMR 553 ('the first judgment'). The first judgment concerned an originating summons filed by the plaintiff. The plaintiff's application in the originating summons was dismissed. Aggrieved by the decision, the plaintiff appealed to the Court of Appeal. When the appeal came up for hearing before the Court of Appeal, the Court of Appeal made an order that the appeal be referred back to the High Court for High Court to decide on the issue of the defendant's counterclaim ('the counterclaim').

Held:

The defendant by way of the counterclaim had proceeded to seek a declaration from the court because there was for all intents and purposes on the face of the record still a valid order in existence from the Pentadbir Tanah Daerah Timur Laut, Pulau Pinang dated 31 March 1998 given pursuant to the powers conferred on the said Pentadbir to issue such an order pursuant to s 11 of the Electricity Act 1990 ('the said order'). It was imperative that a declaratory order as prayed for by the defendant be granted for the reason that until such time as the court makes such a declaratory order as prayed for in the counterclaim, the said order will despite the first judgment would still be on record and in existence albeit not being capable of execution. A declaratory judgment granted herein in the context of the counterclaim would be consistent with the first judgment (see para 31).

[Bahasa Malaysia summary

Penghakiman pertama bertarikh 4 Disember 2002 dan telah dilaporkan dalam *Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd* [2003] 1 AMR 553 ('penghakiman pertama'). Penghakiman pertama adalah berkaitan satu saman pemula yang difailkan oleh plaintif. Permohonan plaintif dalam saman pemula telah ditolak. Terkilan dengan keputusan itu, plaintif telah merayu ke Mahkamah Rayuan. Apabila rayuan didengar di Mahkamah Rayuan, Mahkamah Rayuan telah membuat satu perintah agar rayuan

itu dirujuk semula ke Mahkamah Tinggi untuk Mahkamah Tinggi membuat keputusan berhubung persoalan tuntutan balas defendan ('tuntutan balas tersebut').

Diputuskan:

Defendan melalui tuntutan balas telah memohon satu deklarasi daripada mahkamah kerana terdapat niat dan tujuan atas muka rekod satu perintah yang masih sah yang wujud daripada Pentadbir Tanah Daerah Timur Laut, Pulau Pinang bertarikh 31 Mac 1998 menurut kuasa-kuasa yang diberikan ke atas Pentadbir tersebut untuk mengeluarkan satu perintah menurut s 11 Akta Elektrik 1990 ('perintah tersebut'). Ia adalah penting untuk satu perintah deklarasi seperti yang dipohon oleh defendan dibenarkan kerana sehinggalah mahkamah membuat satu perintah deklarasi sedemikian seperti yang dipohon dalam tuntutan balas, perintah tersebut meskipun terdapat penghakiman pertama akan masih berada atas rekod dan wujud meskipun tidak boleh dilaksanakan. Satu penghakiman deklarasi yang dibenarkan di sini dalam konteks tuntutan balas adalah konsisten dengan penghakiman pertama.]

Notes

For cases on application for declaration, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2052–2072.

Cases referred to

Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd [2003] 1 AMR 553 (refd)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor. [1979] 2 MLJ 101 (refd)

Dickson v Law and Davidson (1895) 2 Ch 62 (refd)

Jumatsah bin Daud v Voon Kin Kuet [1981] 1 MLJ 254 (refd)

Kok Song Kong v BSP Co Sdn Bhd [1988] 2 MLJ 440 (refd)

Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148, (refd)

Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd [1990] 2 MLJ 423 (refd)

Loughran v Loughran 292 US 216 (1934) (refd)

Sterman v EW & WJ Moore (a firm) [1970] 1 QB 596; [1970] 1 All ER 581 (refd)

Woon Kwok Cheng v Tan Sri Datuk Chang Min Tat & 15 Ors [1993] 1 AMR 14 555 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 7(1)
Electricity Act 1990 s 11
Rules of the High Court 1980 O 6 rr 1, 6(2), (3), O 7, O 15 rr 2(1), 16, O 18 rr 3(2), 15, 16, 17, 18, O 28 rr 7, 8(1), O 92 rr 2, 4, Forms 2, 3
Specific Relief Act 1950 s 41

Hamid Sultan bin Abu Baker (Hamid Sultan Loga Chitra & Associates) for the plaintiffs.

Nadzarin Wok Nordin (Nadzarin Kuok Puthucheary & Tan) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] I wrote the first judgment dated 4 December 2002 and it has since been reported vide *Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd* [2003] 1 AMR 553 ('the first judgment'). That first judgment concerned an originating summons in encl 1 filed by the plaintiff and it focused entirely on it. I favoured the defendant in the first judgment and this meant that the plaintiff's application in the originating summons in enclosure one was dismissed with costs. Aggrieved by my decision, the plaintiff appealed to the Court of Appeal. When the appeal came up for hearing before the Court of Appeal with a coram of Gopal Sri Ram, Abdul Kadir Sulaiman and Nik Hashim JJCA, on 12 October 2004, the Court of Appeal made an order that the appeal be referred back to me for me to decide on the issue of the defendant's counterclaim. The order of the Court of Appeal in its original text reads as follows:

> KORAM:
>
> Y.A DATO' GOPAL SRI RAM HMR
>
> Y.A DATO' HAJI ABDUL KADIR BIN SULAIMAN HMR
>
> Y.A DATO' BENTARA ISTANA DATO' NIK HASHIM BIN NIK AB RAHMAN HMR
>
> DALAM MAHKAMAH TERBUKA PADA 12 OKTOBER 2004
>
> PERINTAH
>
> **ATAS RAYUAN** Perayu yang dinamakan di atas **DAN SETELAH MEMBACA** Rekod Rayuan, Hujahan Perayu bertarikh 4hb Oktober 2004 serta Autoriti Perayu, Autoriti Perayu II, Ringkasan Penghujahan Kes Responden dan Ikatan Autoriti Responden bertarikh 4hb Oktober 2004 **DAN SETELAH MENDENGAR** Tuan Haji Hamid Sultan Bin Abu Backer, peguam bagi pihak Perayu dan Encik Nadzarin Wok Nordin (Encik Sahidi Bin Mohamad bersamanya), peguam bagi pihak Responden **MAKA ADALAH DIPERINTAHKAN** bahawa tuntutan balas dikembalikan ke Mahkamah Tinggi untuk diputuskan oleh YA Hakim **DAN ADALAH JUGA DIPERINTAHKAN** bahawa Perayu diberi kebebasan untuk meminda Memorandum Rayuan tanpa kebenaran Mahkamah Rayuan setelah menerima keputusan YA Hakim **DAN ADALAH SETERUSNYA DIPERINTAHKAN** bahawa Rayuan ini ditangguhkan ke satu tarikh yang akan ditetapkan sementara menunggu keputusan YA Hakim terhadap tuntutan balas tersebut **DAN ADALAH AKHIRNYA DIPERINTAHKAN** bahawa kos ditangguhkan.
>
> **DIBERI** di bawah tandatangan saya dan Meterai Mahkamah pada 12 Oktober 2004
>
> tt
>
> ...
>
> PENOLONG KANAN PENDAFTAR MAHKAMAH RAYUAN MALAYSIA
> PUTRAJAYA"

[2] The parties informed me that before the Court of Appeal they have not addressed their Lordships on the issue of whether there is a valid and enforceable counterclaim, at law, for the trial Judge (referring to myself) to decide on the issue of the counterclaim.

[3] Dutifully, I heard the submissions of the parties in regard to the purported counterclaim as directed by the Court of Appeal.

THE FIRST JUDGMENT

[4] The facts of this case have been set out in the first judgment and I do not propose to repeat them here again. Suffice for me to say that in the first judgment at pp 571–572 of the report, I made reference to the counterclaim that was averred in the affidavit in reply of the defendant which portrayed that the defendant intended to seek a counterclaim against the plaintiff. This was what I wrote in the first judgment:

> There is another matter that I should allude to. It is this. The affidavit in reply of Muhammad Syafi'i bin Gampang as seen in encl 4 shows categorically that the defendant intends to seek a counterclaim against the plaintiff for:
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> (a) a declaration that the defendant need not pay the plaintiff the compensation awarded on the ground that the project has been cancelled and the defendant has issued a notice of cancellation of the said project to the plaintiff;
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> (b) alternatively, an order pursuant to O 92 r 4 of the RHC to the effect that the compensation awarded by the District Land Administrator be cancelled on the grounds as stated in paragraphs 5 and 6 of the affidavit in reply in encl 4;
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> (c) costs; and
>
> (d) any other order or relief which this court thinks fit.

[5] All these prayers can be seen at para 12 of encl 4. Later on in the first judgment, I alluded, once again, to the defendant's purported counterclaim and this was what I said (see p 578 of the report):

> In regard to the defendant's counterclaim, the learned counsel for the plaintiff submits that the defendant is not entitled to the declaration sought because the defendant had failed, in the first place, to avail itself of the appeal procedure as set out in s 16(2) of the said Act. It is also submitted on behalf of the plaintiff that the defendant had not sought a judicial review to quash the award of the District Land Administrator and, consequently, the defendant should not be allowed to use the forum of this court to revive its right of appeal and to seek a judicial review of the whole matter which have since been time barred. For all these reasons, the plaintiff seeks for an order in terms of its application in encl 1.

[6] It is ideal to mention that in the first judgment any reference to the 'said Act' would refer to the Electricity Supply Act 1990.

IS THERE REALLY A VALID COUNTERCLAIM?

[7] I have painstakingly read the court file several times. The court file starts with the originating summons marked as encl 1 as alluded to in the first judgment. It is trite that civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition. These are the basic modes to begin proceedings in the High Court. Of course, the most common mode is the

commencement of the proceeding by way of a writ of summons. The plaintiff here chose not to file the writ of summons. Rather the plaintiff preferred to begin the proceeding by way of an originating summons in encl 1.

[8] If proceedings are commenced by the wrong mode, the courts have three (options to select, either:

(1) to wholly set them aside as being irregular; or

(2) to convert the originating summons into a writ action; or

(3) to strike it out forthwith.

[9] It must be borne in mind that every writ of summons must be in the appropriate form as prescribed by the Rules of the High Court 1980 ('RHC') (see O 6 r 1 of the RHC and Forms 2 and 3 in the RHC). The Registrar must sign every copy of the writ for service and it must be sealed with the seal of the court out of which it is issued as required under s 7(1) of the Courts of Judicature Act 1964. However, the failure to have the writ sealed by the Registrar and such mistake is that of the Registrar would render it as an irregularity that will not nullify the proceedings. The court in *Dickson v Law and Davidson* (1895) 2 Ch 62 held that it was a mere irregularity that the writ was not indorsed for service out of the jurisdiction. The serial number of the writ will be assigned by the Registrar on presentation of the writ for sealing and the Registrar too shall sign, seal and date the writ whereupon the writ shall be deemed to be issued (see O 6 r 6(2), (3) of the RHC and O 92 r 2 of the RHC). The wordings of Forms 2 and 3 of the RHC would show that the writ is directed solely to the defendant and it is expressed in strong imperative terms requiring the defendant either to satisfy the plaintiff's claim or cause an appearance to be entered. In this way, the defendant is put on the alert and the plaintiff may proceed with the action if the defendant plays possum and the plaintiff may even enter judgment in default against the defendant without any further notice.

[10] A writ is effective only when it is issued and a writ is said to be deemed issued when it is sealed by the Registrar. Any litigant who lodges the correct cause papers for the initiation of the suit and pays the necessary fees would have his cause papers sealed by the Registrar (*Jumatsah bin Daud v Voon Kin Kuet* [1981] 1 MLJ 254; and *Kok Song Kong v BSP Co Sdn Bhd* [1988] 2 MLJ 440). It is common knowledge among the legal fraternity that before a writ of summons is issued, it must be indorsed with a statement of claim or if the statement of claim is not indorsed on the writ then there must be a concise statement of the nature of the claim made or the relief or remedy required in the action (*Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423; and *Sterman v EW & WJ Moore (a firm)* [1970] 1 QB 596; [1970] 1 All ER 581 (CA)).

[11] On pleadings, generally, I shall refer to O 18 of the RHC. Order 18 r 15 of the RHC states as follows:

15 Statement of claim (O 18 r 15)

(1) A statement of claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.

(2) A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned; but, subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement.

[12] This would be followed by O 18 r 16 of the RHC, which states as follows:

16 Defence of tender (O 18 r 16)

Where in any action a defence of tender before action is pleaded, the defendant must pay into Court in accordance with Order 22 the amount alleged to have been tendered, and the tender shall not be available as a defence unless and until payment into Court has made.

Then, there is O 18 r 17 of the RHC:

17 Defence of set-off (O 18 r 17)

Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.

Finally, there is O 18 r 18 of the RHC which states as follows:

18 Counterclaim and defence to counterclaim (O 18 r 18)

Without prejudice to the general application of this Order to a counterclaim and a defence to counterclaim or to any provision thereof which applies to either of those pleadings specifically —

(a) rule 15 (1) shall apply to a counterclaim as if the counterclaim were a statement of claim and the defendant making it a plaintiff;

(b) rules 8(2), 16 and 17 shall, with the necessary modifications apply to a defence to counterclaim as they apply to a defence.

[13] The types of pleadings are the statement of claim, the statement of defence, counterclaim and set-off, reply and defence to the counterclaim. In the statement of claim, the plaintiff sets out the facts on which he relies in order to show that he is entitled to the claim in his favour as against the defendant. A defendant who has entered an appearance and intends to defend an action must prepare and serve the statement of defence to the plaintiff. In his statement of defence, the defendant must plead to the allegations and he must also deny specifically to the allegations contained in the statement of claim. In his statement of defence too, a defendant may plead any matter which has arisen at any time, whether it be before or after the issuance of the writ.

[14] If a defendant has a claim to a sum of money arising in whole or in part out of the plaintiff's statement of claim, the defendant may include his claim in his statement of defence and set it off against the plaintiff's claim.

[15] If a defendant has any claim or relief or remedy against a plaintiff, the defendant may, instead of bringing a separate action, incorporate a counterclaim

in respect of it. A counterclaim must be added to the defence (see O 15 r 2(1) of the RHC) and it must state specifically the relief or remedy which the defendant is claiming.

[16] In appropriate circumstances, the plaintiff may serve a reply and defence to the counterclaim. If a defendant serves a counterclaim on the plaintiff, and the plaintiff desires to defend it, the plaintiff must serve a defence to the counterclaim to the defendant (see O 18 r 3(2) of the RHC).

[17] I have set out in some detail the types of pleadings available to the legal practitioners in the context of our RHC. The purpose is simple. It is to show that in the court file there is no statement of claim. There is also no statement of defence nor is there a counterclaim thereto. There is also no set-off and there is also no reply and defence to the counterclaim. The only inkling of a counterclaim in the court file comes from the affidavit in reply of the defendant affirmed through Muhammad Syafi'i bin Gampang that was affirmed on 21 November 2001 as seen in encl 4 and it has been highlighted in the first judgment and it has also been reproduced in this judgment. The defendant has only paid the praecipe of RM8 to file the affidavit in reply of Muhammad Syafi'i bin Gampang in encl 4. In sharp contrast, a counterclaim is a cause of action and according to the court practice it requires the payment of RM200 as praecipe. It is an admitted fact that the sum of RM200 had not been paid by the defendant at the time when the affidavit in reply of Muhammad Syafi'i bin Gampang was filed by the defendant. As demonstrated, a counterclaim can only be raised if the plaintiff had filed the writ of summons and not by way of an affidavit in reply in encl 4. Moreover, an affidavit in reply in encl 4 and the pleadings are poles apart. They are two different things. The law does not permit a counterclaim to be dealt with by way of an affidavit in reply in encl 4.

[18] From the court file, the affidavit in reply of the plaintiff affirmed by Khoo Boo Tee on 6 December 2001 as seen in encl 5 was filed by way of a response to the affidavit in reply of Muhammad Syafi'i bin Gampang in encl 4. The affidavit in reply of Khoo Boo Tee in encl 5 certainly makes for an interesting reading material. Paragraphs 12 and 13 of the affidavit in reply of Khoo Boo Tee in encl 5 were worded in this way:

> 12. In regard to paragraphs 10, 11 and 12 of the defendant's affidavit, I am advised by the plaintiff's solicitors and verily believe that the defendant's counterclaim pleaded therein is improper and inconsistent with the rules of the Court. Under Order 28 rule 7(2) of the Rules of the High Court 1980, the defendant is first required to inform of the Court of his counterclaim at the first or resumed hearing of the summons and only after the Court has given directions thereof can the defendant plead its counterclaim.
>
> 13. In any case, I am advised by the plaintiff's solicitors and verily believe that the defendant's counterclaim lacks substance and need not be considered as a separate cause of action at all as the court's determination of the plaintiff's claim would adequately dispose of the defendant's counterclaim.

By way of an affidavit in reply of the defendant affirmed by Mohd Ramlee bin Ab Rahman on 18 April 2002 as seen in encl 6 by way of a response to the affidavit in reply of Khoo Boo Tee in encl 5, Mohd Ramlee bin Ab Rahman deposed at para 11 of his affidavit in reply in this way:

11. Sebagai jawapan defendan kepada perenggan 12 afidavit jawapan plaintif, kami telah dinasihati oleh peguam kami dan sesungguhnya percaya bahawa sekiranya dilihat oleh Mahkamah yang mulia ini, apa yang dinyatakan di perenggan 11 dan 12 afidavit jawapan defendan adalah sepertimana apa yang dikehendaki oleh Aturan 28 Kaedah 7 Kaedah-Kaedah Mahkamah Tinggi 1980 dan bahawasanya terpulang sekarang kepada Mahkamah yang mulia ini untuk memberi arahan selanjutnya.

[19] These three affidavits alluded to the counterclaim of the defendant. The learned counsel for the plaintiff submitted that the counterclaim was not properly brought before this court. Holding an opposite view was that held by the learned counsel for the defendant who implored this court to consider the counterclaim pursuant to O 28 r 7 of the RHC which states as follows:

7. Counterclaim by defendant (O 28 r 7)

(1) A defendant to an action begun by originating summons who has entered an appearance to the summons and who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising) may make a counterclaim in the action in respect of that matter instead of bringing a separate action.

(2) A defendant who wishes to make a counterclaim under this rule must at the first or any resumed hearing of the originating summons by the Court, but, in any case, at as early a stage in the proceedings as is practicable, inform the Court of the nature of his claim and, without prejudice to the powers of the Court under paragraph (3), the claim shall be made in such manner as the Court may direct under rule 4 or 8.

(3) If it appears on the application of a plaintiff against whom a counterclaim is made under this rule that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient.

[20] Now, the Court of Appeal has directed me to consider the counterclaim and I am bound by its direction notwithstanding the fact that the counterclaim hinged on these three affidavits. But it must be recalled that these three affidavits arose out of the originating summons in encl 1 filed by the plaintiff. As I said earlier that an originating summons is one of the modes prescribed by the RHC to begin proceedings in the High Court. Formal matters relating to originating summonses are dealt with in O 7 of the RHC while O 28 of the RHC deals with procedure. They must be read together in order to obtain a bird's eye view of how proceedings by way of an originating summons are being regulated.

[21] In the interest of justice and for the sake of expediency and by virtue of the direction of the Court of Appeal and bearing in mind that the arguments of the parties as alluded to in the first judgment were quite extensive, I have no choice but to make an order that the proceedings herein to continue as if the cause or matter had been so begun by writ and I too ordered that the affidavits shall stand as pleadings without any liberty to any of the parties to add thereto or to apply for particulars thereof (see O 28 r 8(1) of the RHC).

THE COUNTERCLAIM OF THE DEFENDANT

[22] In the early part of this judgment, I have alluded to the first judgment wherein the defendant's counterclaim has been set out. In that counterclaim, the defendant seeks for prayers (a), (b), (c) and (d) of para 12 of the affidavit in reply of Muhammad Syafi'i bin Gampang in encl 4.

[23] In essence by virtue of O 28 r 7 of the RHC the defendant seeks by way of prayer (a) of para 12 for a declaration that the defendant need not pay the compensation awarded to the plaintiff on the grounds that the project has been cancelled and the defendant has issued a notice of cancellation by way of a letter to the plaintiff dated 1 December 1998 cancelling the project. By way of prayer (b) of para 12 and as an alternative, the defendant prays pursuant to O 92 r 4 of the RHC that the order for compensation dated 31 March 1998 issued by the Pentadbir Tanah Daerah Timur Laut, Pulau Pinang be set aside on the grounds as contained at paragraphs 5 and 6 of the affidavit in reply of Muhammad Syafi'i bin Gampang affirmed on 21 November 2001 as reflected in encl 4. The defendant also seeks by way of prayer (c) of para 12 for costs. And by way of prayer (d) of para 12, the defendant seeks for any other order or relief which this court thinks fit.

[24] Now, in the first judgment dated 4 December 2002, I had dismissed, inter alia, the plaintiff's claim in the main suit in this action for a declaration that the defendant is obliged to pay compensation to the tune of RM1,016,453.43 to the plaintiff in accordance with the order of the Pentadbir Tanah Daerah Timur Laut, Pulau Pinang dated 31 March 1998. The defendant was certainly elated at my decision and now the defendant humbly wishes to drop the prayer in respect of the declaration referred to at prayer (a) of para 12 of the affidavit in reply of Muhammad Syafi'i bin Gampang affirmed on 21 November 2001 as reflected in encl 4 which prayed that the defendant need not pay compensation to the plaintiff on the grounds that the project has been cancelled and the defendant has issued a notice of cancellation by way of a letter to the plaintiff dated 1 December 1998 cancelling the project as the same is now redundant. My decision in the first judgment was well received by the defendant.

[25] Now, the defendant is seeking the alternative prayer (b) of para 12 of encl 4 as well as prayer (c) of para 12 of encl 4 and prayer (d) of para 12 of encl 4.

[26] It is ideal to state that the facts which support the counterclaim herein are the same facts which appear in the main suit itself and which have been set out in extenso in the first judgment. The grounds on which this counterclaim is based are exactly the same as what the defendant has submitted in defence to the plaintiff's claim. In summary, they may be stated as follows:

(1) that the defendant is entitled, albeit impliedly, to revoke and/or withdraw from the written notice as well as from the order of the Pentadbir Tanah Daerah Timur Laut, Pulau Pinang pursuant to s 11 of the Electricity Act 1990;

(2) that s 11 of the Electricity Act 1990 cannot be invoked to force the defendant to pay compensation to the plaintiff since it is no longer necessary to enter into the plaintiff's land; and

(3) that the purpose of the Electricity Act 1990 when read in its correct perspective will be defeated in the event the defendant is obliged to pay to the plaintiff the compensation awarded even though the defendant had not entered into the plaintiff's land and the defendant had abandoned the project.

[27] The learned counsel for the plaintiff in the context of the counterclaim submitted that the defendant had done a wrong to the plaintiff by unscrupulously issuing the notice of cancellation by way of a letter dated 1 December 1998. Thereafter, the defendant says that it has revoked the notice notwithstanding the land administrator's award. According to the learned counsel for the plaintiff, prima facie the defendant has committed an act which entitles the plaintiff to damages at common law. Even the land administrator, according to the plaintiff's counsel, had rightfully granted an award for compensation under the Electricity Act 1990. Again, the learned counsel for the plaintiff pointed out that the defendant had not set aside the award granted by the land administrator. That being the case, according to the learned counsel for the plaintiff, the defendant cannot now invoke the court's equitable jurisdiction to deny the plaintiff's right to compensation whether statutory or otherwise. According to the learned counsel for the plaintiff, this is not the case for this court to invoke O 92 r 4 of the RHC which reads as follows:

> 4. Inherent powers of the Court (O 92 r 4)
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> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[28] It was pointed out by the learned counsel for the plaintiff that this court can only dismiss the defendant's purported declaration for the simple reason that the declaration sought constitutes a discretionary relief. It was impressed upon me that the matter has now fallen into the hands of the Court of Appeal to decide whether, at law, the plaintiff is entitled to the declaration as sought for in the originating summons in encl 1. It was emphasised that the defendant was not vigilant in seeking to set aside the order made by the land administrator. It was also emphasised that laches has set in and that would bar the defendant from succeeding in its counterclaim. It was further argued by the learned counsel for the plaintiff that the declaratory relief under the Specific Relief Act 1950 is only granted at the discretion of the court and that it cannot be granted as of right. It was pointed out that those who come before the court seeking an equitable relief must come to court with clean hands. But it must be borne in mind that according to Brandeis J in *Loughran v Loughran* 292 US 216 (1934) at p 229 that, 'Equity does not demand that its suitors shall have led blameless lives.'

[29] It is now trite law that the right to a declaration is governed by s 41 of the Specific Relief Act 1950 which enacts that (the relevant parts only):

> Any person entitled to any legal character, …, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, …….

And this must be read with O 15 r 16 of the RHC which reads as follows:

> 16 Declaratory judgment (O 15 r 16)
>
> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[30] I have written elsewhere in relation to declaratory reliefs. The law books are replete with authorities on this subject matter. Suffice for me to say that the court's power to make a declaratory judgment or order is always discretionary in nature. Lee Hun Hoe CJ (Borneo) in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor.* [1979] 2 MLJ 101 at p 107, writing a separate judgment had this to say:

> The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

Abdoolcader J in *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148, aptly said at p 153 of the report:

> The court's power to make declaratory judgments is confined to matters justifiable in the courts, and the binding declarations which it can make under Order 15 rule 16 of the Rules of the High Court, 1980 are limited to legal or equitable rights and do not extend to moral, social or political matters (*Malone v. Metropolitan Police Commissioner* [1979] 1 Ch 344 at p 353).

[31] The defendant by the name of Tenaga Nasional Bhd by way of the counterclaim has proceeded to seek a declaration from this court because there is for all intents and purposes on the face of the record still a valid order in existence from the Pentadbir Tanah Daerah Timur Laut, Pulau Pinang dated 31 March 1998 given pursuant to the powers conferred on the said Pentadbir to issue such an order pursuant to s 11 of the Electricity Act 1990 ('the said order'). In my judgment, it is imperative that a declaratory order as prayed for by the defendant be granted for the simple reason that until such time as this court makes such a declaratory order as prayed for in the counterclaim, the said order will despite the court's judgment dated 4 December 2002 — referring to the first judgment, would still be on record and in existence albeit not being capable of execution. In my judgment, a declaratory judgment granted herein in the context of the counterclaim would be consistent with my decision in the first judgment.

[32] One further and final point must be mentioned. It is this. That any delay in filing the suit for a declaration herein of approximately two years from the date of its notice to terminate the said project dated 1 December 1998 does not and cannot bar the defendant from filing and/or applying for a declaration as set out in the

counterclaim. If authority is needed for this proposition of the law reference to the case of *Woon Kwok Cheng v Tan Sri Datuk Chang Min Tat & 15 Ors* [1993] 1 AMR 14 555 at p 565 should be made.

[33] In the final analysis, I must allow the prayers at para 12(b) and at para 12(c) of the affidavit in reply of Muhammad Syafi'i bin Gampang that was affirmed on 21 November 2001 as per encl 4 which constitutes the defendant's counterclaim. In regard to the prayer at para 12(a) of the affidavit in reply of Muhammad Syafi'i bin Gampang affirmed on 21 November 2001 as reflected at encl 4, it should be struck out since the defendant has decided to drop it in the course of its submission before this court.

Order accordingly.

Reported by Peter Ling